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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 187

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association; **G. W. MINSON**, individually and as Secretary, General Committee of Adjustment, Chicago and North Western Railway Company, and Local Chairman of said Association; **A. O. Best**, individually and as Local Chairman of said Association; **HOWARD R. GILLETTE**, individually and as Local Chairman of said Association; **R. B. SEGER**, individually and as Secretary and Local Chairman of said Association; **BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN**, an unincorporated association; **W. I. CARREL**, individually and as Vice Chairman of said Association; **K. O. WHITE**, individually and as Local Chairman of said Association; **VAUGHN R. WARD**, individually and as General Chairman of said Association; **E. H. DONNELLY**, individually and as Vice Chairman of said Association; **J. R. MAYER**, individually and as Local Chairman of said Association; **BROTHERHOOD OF RAILROAD TRAINMEN**, an unincorporated association; **W. A. BURKE**, individually and as Vice Chairman and Local Chairman of said Association; **T. A. MILLER**, individually and as Local Chairman of said Association; **E. STOUVENEL**, individually and as Local Chairman of said Association; **M. VITIRITTO**, individually and as Local Chairman of said Association; **R. W. STANLEY**, individually and as General Chairman of said Association; **H. L. HEMPHILL**, individually and as Local Chairman of said Association; **SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO**, an unincorporated association; **E. H. KANE**, individually and as General Chairman of said Association; **E. K. BRAINERD**, individually and as Local Chairman of said Association, *Petitioners*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1159.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association; **G. W. MINSON**, individually and as Secretary, General Committee of Adjustment, Chicago and North Western Railway Company, and Local Chairman of said Association; **A. O. Best**, individually and as Local Chairman of said Association; **HOWARD R. GILLETTE**, individually and as Local Chairman of said Association; **R. B. SEGER**, individually and as Secretary and Local Chairman of said Association; **BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN**, an unincorporated association; **W. I. CARREL**, individually and as Vice Chairman of said Association; **K. O. WHITE**, individually and as Local Chairman of said Association; **VAUGHN R. WARD**, individually and as General Chairman of said Association; **E. H. DONNELLY**, individually and as Vice Chairman of said Association; **J. R. MAYER**, individually and as Local Chairman of said Association; **BROTHERHOOD OF RAILROAD TRAINMEN**, an unincorporated association; **W. A. BURKE**, individually and as Vice Chairman and Local Chairman of said Association; **T. A. MILLER**, individually and as Local Chairman of said Association; **E. STOUVENEL**, individually and as Local Chairman of said Association; **M. VITIRITTO**, individually and as Local Chairman of said Association; **R. W. STANLEY**, individually and as General Chairman of said Association; **H. L. HEMPHILL**, individually and as Local Chairman of said Association; **SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO**, an unincorporated association; **E. H. KANE**, individually and as General Chairman of said Association; **E. K. BRAINERD**, individually and as Local Chairman of said Association, *Petitioners,*

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Chicago and North Western Railway Company ("North Western"), under Rule 24 of this Court, submits this brief in opposition to the petition for writ of certiorari filed by various labor organizations, and certain of their officers and agents, defendants in the District Court and appellants in the Court of Appeals below (hereinafter collectively called "labor organizations").

STATEMENT OF THE CASE.

(a) The Judgments of the Courts Below.

A restatement of the case is required for a fuller understanding of the factual basis for the judgment of the District Court, as affirmed by the Court of Appeals.

The dispute between North Western and the labor organizations, from which this action for a declaratory judgment arose, involved the proposed consolidation by North Western of two of its separate railroad yards at Marshalltown, Iowa into a single yard. The following statement of the issue by the District Court was cited with approval by the Court of Appeals (App. to Petn. 9a, 18a-19a):

> "The basic question presented herein is whether the parties are required to follow the procedures of the Railway Labor Act (45 U.S.C., Sec. 151, et seq.) in effecting the proposed co-ordination of North Western's railroad yards at Marshalltown, Iowa, or whether the parties are required to follow the procedures prescribed by the 'stipulation' entered into by the parties and authorized by the Interstate Commerce Commission in its order approving the merger under the provision of Section 5(2) (f) and Section 5(11) of the Interstate Commerce Act, 49 U.S.C., Sec. 5(2) (f), 5(11)."

The final declaratory judgment of the District Court on this basic question, as affirmed by the Court of Appeals, was as follows (App. to Petn. 14a, 19a, 34a):

"1. That the Railway Labor Act (49 U.S.C. 151, et seq.) is inapplicable to the proposed coordination of plaintiff's Marshalltown railroad yards.

"2. The parties hereto in carrying out the proposed coordination are required to follow the procedures prescribed by the stipulation entered into on August 4, 1960 and filed in Finance Docket No. 21115 before the Interstate Commerce Commission."

(b) The Proceedings Before the Commission, Including the Stipulation Under Section 5(2)(f) of the Interstate Commerce Act.

The proceedings before the Interstate Commerce Commission to which the judgment of the District Court refers involved the Commission's approval of the purchase by North Western of the properties and franchises of The Minneapolis & St. Louis Railway Company ("M&StL") (R. 225-44). The Commission's jurisdiction over this transaction derives from Sections 5(2) and 5(11) of the Interstate Commerce Act under which it is vested with "exclusive and plenary" authority to approve and authorize "any carrier * * * to purchase * * * the properties of another * * *."

As a partial basis for its conclusion that the proposed transaction was "clearly consistent with the public interest" (R. 234-235), the Commission found (R. 232):

> "Integration of the two railroads would permit the consolidation of supervisory, accounting and traffic functions, and elimination of duplicate facilities through the consolidation of various yards and terminals."

With reference to the elimination of duplicate facilities through the consolidation of yards and terminals, the evidence before the Commission disclosed that among the principal M&StL yards were those at Marshalltown, at which

point North Western also maintained its own separate yard (R. 141). The evidence also referred to the resultant ability of North Western, in the event of purchase, to "eliminate a number of duplicating facilities," there then being "twenty common points with the M&StL" (R. 153). Although it was contemplated that the newly acquired property would "in general" be operated as a separate division of North Western, it was also expressly recognized that there might be some "minor" shifting of divisional boundaries (R. 150).

In approving the proposed transaction under Section 5 (2) (a) of the Interstate Commerce Act, the Commission was subject to the mandate of Section 5 (2) (f), which provides that, as a condition to its approval of any Section 5 (2) transaction, the Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." Section 5 (2) (f) does not require, however, that "a fair and equitable arrangement" be formulated exclusively by the Commission. Thus, the concluding sentence of this paragraph provides:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

With reference to its obligations under the first sentence of Section 5 (2) (f), the Commission noted and found in its order as follows (R. 238):

> "Applicants also entered into a stipulation with railway labor organizations represented by the Railway Labor Executives' Association for the protection of all employees of the applicants whose bargaining representatives are members of the association. *The stipulation is of the character contemplated by section 5(2) (f) of the act for the protection of railway employees who may be adversely affected by the trans-*

> *action authorized.* As to the employees covered by the stipulation no conditions in our order are necessary. As to employees of the applicants not covered by the aforesaid stipulation, we will prescribe for their protection conditions similar to those set forth in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177."*

The stipulation to which the Commission referred is of record (R. 200-204).** As shown therein (R. 200, 201, 204), the Railway Labor Executives' Association (also referred to as Joint Committee of Railway Labor Organizations), a signatory of the Stipulation, acted as the duly designated representatives of the four petitioning labor organizations, among others. The fact of such duly authorized representation is also the subject of Paragraph 1-(f) of a separate stipulation of record by the parties in this proceeding, dated December 5, 1961 (R. 43-44).

The Stipulation, in referring to the Commission's statutory duty under Section 5 (2) (f) to require "a fair and equitable arrangement to protect the interests of the railroad employees affected," provides (R. 203):

> "That in the event the Interstate Commerce Commission shall grant the authority requested in Finance Docket No. 21115, the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employes as provided in Section 5 (2) (f) of the Interstate Commerce Act, as amended."

The Stipulation also provides that with certain modifications thereafter specified:

> "* * * the Agreement of May, 1936, Washington D. C.,

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* Emphasis is supplied throughout this brief.

** This document in its entirety is captioned "Stipulation and Agreement." The Agreement is attached to and made a part of the Stipulation as Exhibit A. For brevity, the Stipulation and Agreement will be referred to as the "Stipulation."

> commonly referred to as the Washington Job Protection Agreement, is hereby adopted and shall be applied for the protection of employees of the above-named carriers who may be adversely affected by Interstate Commerce Commission approval of the applications or petitions in the proceedings designated as Finance Docket No. 21115, the primary object of which is the merger of the carriers named above . . . ."

A copy of that agreement is also of record (R. 205-224).

Section 1 of the Washington Agreement states as its purpose in pertinent part as follows (R. 205):

> "That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination."

The term "coordination" is thereafter defined in Section 2(a) as follows (R. 206):

> "The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

As may be noted from its provisions, the remaining portions of the Washington Agreement deal largely with the procedures governing the effectuation of each coordination and the manner of determining eligibility for, and the computation of, various monetary allowances and other financial benefits for employees displaced or otherwise adversely affected by a coordination. Section 5, in particular, relating to the necessity of an agreement in certain circum-

stances as to the manner in which a coordination may be effected, provides as follows (R. 207):

> "Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

Under Paragraph 2 of the Stipulation, however, the parties deleted Section 13 of the Washington Agreement and inserted in its place language appropriate to the purpose of the Stipulation to provide protection within the statutory language of Section 5(2)(f) and an arbitration clause more suitable to the circumstances of the pending transaction (R. 203).

It was also recognized that not all of the separate facilities of North Western and M&StL could be coordinated on the effective date of the purchase transaction. Accordingly, in contemplation of subsequent individual coordinations to be effected by North Western, as the surviving carrier, section 11 of the Stipulation provides as follows (R. 202):

> "The term 'effective date of coordination' as used herein means, with respect to the various facilities or operations to be consolidated, the date on which the surviving carrier consolidates the particular facilities or operations."

(c) North Western's Proposed Consolidation of Its Marshalltown Yards in Accordance With the Procedures Under the Stipulation.

As previously noted, the evidence before the Commission disclosed that among the separate facilities through which North Western and M&StL, by virtue of their separate identity, had rendered separate services in 20 different communities were the railroad yards at Marshalltown, Iowa (R. 141). A map of these yard facilities is of record (R. 245). As shown therein, the yard areas and tracks of the two railroads were contiguous and were connected by a track over which the two separate railroad companies interchanged traffic.

Prior to November 1, 1960, the effective date of the purchase transaction, North Western handled its switching in its Marshalltown yard through a single yard engine assigned to one 8-hour shift 5 days each week.* Its employees at this yard consisted of the following classes and numbers: One engineer, represented for collective bargaining purposes by the Brotherhood of Locomotive Engineers; one fireman, represented by the Brotherhood of Locomotive Firemen and Enginemen; one yard foreman and two yard helpers, each represented by the Brotherhood of Railroad Trainmen. The engineer and firemen held seniority in their respective crafts over the east subdivision of respondent's Iowa Division, which included its Marshalltown yards. The yard foreman and helpers held seniority in all of respondent's yards on the east and west subdivisions of its Iowa Division.

M&StL handled its larger Marshalltown yard switching operations through the assignment of yard engines cover-

*Unless otherwise noted, the remaining statement under this part (c) is based on the admitted allegations of the complaint (R. 7-8, 42).

ing two 8-hour shifts, one shift covering 6 days, and the other 7 days, each week. The following classes and number of employees were assigned to each shift: One engineer, represented for collective bargaining purposes by the BLE; one fireman, represented by the BLF&E; and one yard foreman and two yard helpers, represented by SUNA. Each of the engineers and firemen held seniority in their respective crafts on all M&StL lines of railroad south of Albert Lea, Minnesota to Peoria, Illinois. Seniority of the yard foreman and helpers was limited to the Marshalltown yards. In addition to these employees, there was also assigned to a single 8-hour shift, 6 days each week, a yardmaster, represented by the Railroad Yardmasters of America, a labor organization not involved in this controversy.

Section 4 of the Washington Agreement governs the notice requirements in the case of each proposed coordination. By appropriate posting of notice thereunder dated December 16, 1960, North Western advised all employees who might be affected "that the C&NW contemplates coordinating yard operations at Marshalltown * * * effective not earlier than March 17, 1961." The notice further stated that it was contemplated that all Marshalltown yard operations would be placed under the jurisdiction of the M&StL Division superintendent and that, in effect, "yard assignments would include the entire combined yards without being limited to one or the other of the separate yards belonging to either North Western or M&StL prior to the purchase transaction. The notice also stated that "* * * it was contemplated that the coordination will result in the abolishment of 1 yard engine assignment (1 engineer, 1 fireman, 1 foreman and 2 helper assignments)." By letter of December 13, 1960 to the representatives of the employees involved, to which letter was also attached a copy of the notice to be posted on December 16, North Western requested a conference on the proposed coordination in ac-

cordance with Section 4 of the Washington Agreement, as stipulated, for the purpose of reaching an agreement, as contemplated by Section 5 of the Washington Agreement. The letter and notice are of record (R. 248-250).

(d) The Refusal by the Labor Organizations to Process the Proposed Coordination in Accordance With Their Stipulation.

North Western's letter and notice were ultimately followed by an initial conference between the parties on January 12, 1961. Prior to this meeting, the conflicting positions of the parties were set forth in correspondence between their respective representatives (Exs. F-1 through F-10; R. 251-262). As shown particularly in Exhibits F-1, F-3, F-4, F-6, F-7 and F-8, the representatives of the BRT and BLF&E disavowed any intention to process the proposed coordination under the Stipulation and Washington Agreement, contending instead that North Western's notice constituted the service of a Section 6 proposal under the Railway Labor Act or that the proposal, if made under the Washington Agreement, was in violation of the Railway Labor Act (R. 251-253; 255-260).

In correspondence following the conference of January 12, 1961, each of the labor organizations expressly asserted, or clearly implied, that the proposed coordination would involve changes in existing seniority arrangements, and would therefore be processed only as a Section 6 proposal under the Railway Labor Act (Exs. F-11 through F-17; R. 262-269).

In view of petitioners' refusal to attempt to reach any agreement as provided in the Stipulation and Washington Agreement, North Western's Director of Personnel advised petitioners on March 29, 1961 of the North Western's intent to submit the dispute to arbitration under the terms

of the Washington Agreement, as modified by Section 2 of the Stipulation. On April 5, 1961 petitioners were advised of the identity of the arbitrator designated by North Western (Exs. F-18 and F-19; R. 269-271). By subsequent letters to North Western's Director of Personnel, the BLF&E, BRT and BLE again disavowed any intent to process the proposed coordination through arbitration, as provided in the Stipulation and Washington Agreement (Exs. F-20 through F-25; R. 271-276).

On April 7, 1961 North Western's Director of Personnel received the following telegram from the Executive Secretary of the National Mediation Board warning of a threatened strike (Ex. F-27; R. 277):

> "Following wire received from BLF&E and BRT 'Consideration now being given towards approving withdrawal of C&NW railway employees represented by BRT and BLF&E effective with carrier proposed changes at Marshalltown, Iowa.' Please wire statement."

By telegram of April 10 and letter of April 11, 1961, in reply, North Western's Director of Personnel summarized the history of the controversy and requested that the National Mediation Board designate a neutral arbitrator, as contemplated by the parties under Section 2 of their Stipulation (Exs. F-28 and F-29; R. 277-280). Thereafter, the National Mediation Board requested by letter that the national presidents of the BLF&E and BRT comment on the representations made by North Western (Ex. F-30; R. 280). A copy of this letter was also sent to the Grand Chief Engineer of the BLE. In summarizing his position in his reply to the Board, the Grand Chief Engineer asserted that "(N)owhere in either of the agreements can it be shown that the contents override the application of the provisions of Section 6 of the Railway Labor Act when revision and or abrogation of contractual rules

are necessary to fulfill the proposed plans of the carrier or carriers." (Ex. F-31; R. 281.) In turn, the presidents of the BRT and BLF&E advised the Board that "(W)e concur in the views expressed by him [the Grand Chief Engineer]." (Ex. F-33; R. 283.) Replying to these letters, North Western's Director of Personnel reiterated his request "that the neutral member of the arbitration committee be appointed as promptly as possible." (Ex. F-34; R. 284.)

In his reply of May 1, 1961 to the Chief Executive Officers of the BLE, BLF&E and BRT, the Executive Secretary of the National Mediation Board expressed the Board's understanding of the controversy in the following terms (Ex. F-35; R. 286):

> "If the Board understands the current situation, it is the position of the organizations that in order to make effective the coordination of facilities at Marshalltown which has been proposed by the carrier, the organizations are of the opinion that it will be necessary for the carrier to revise certain rules of the existing agreements in order to bring about this consolidation or coordination and that such revisions must be handled under Section 6 of the Railway Labor Act."

A conference held on May 18, 1961 at the request of the Board "to develop information regarding the proposals of the carrier and the positions of the various organizations" resulted in the reassertion of their respective positions by all parties to the controversy (Par. XVII, Cplt., Admitted; R. 17, 49).

As a result of the failure to reach agreement on the proposed coordination in accordance with the terms of the Stipulation and Washington Agreement, North Western's Marshalltown yards are presently conducted through the same separate operations and with the same arrange-

ment of labor forces as existed prior to November 1, 1960, during which time these yards were under the separate ownership, operation and control of North Western and M&StL (Par. XVIII, Cplt., Admitted: R. 18, 49).

QUESTION PRESENTED.

Where a proposed consolidation of railroad yard facilities was clearly contemplated as a part of a transaction approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act, may railroad labor organizations invoke the procedures of the Railway Labor Act to avoid the effectuation of that consolidation in accordance with the procedures required by an agreement entered into between the labor organizations and the carrier under Section 5(2)(f) of the Act?

SUMMARY OF ARGUMENT: REASONS FOR DENYING THE WRIT.

1. The proposed Marshalltown yards consolidation falls within the scope of the transaction approved by the Commission and the Stipulation of the parties.

2. Having been entered into expressly for the purpose of Section 5(2)(f) of the Interstate Commerce Act in connection with the specific purchase transaction to which it relates, the Stipulation is not an agreement under the Railway Labor Act and the courts below correctly concluded that its implementation and operation are not displaced by the procedures of that Act.

3. The petitioners observe that "(W)hether a railway labor agreement may be judicially enforced by an order entered for specific performance of its provisions for voluntary arbitration is believed to present a question of first impression." Whatever the general validity of this com-

ment, it is a non-sequitur here since this question is not presented by the opinions or judgments of the courts below.

4. The decision of the Court of Appeals below has been expressly limited to the "peculiar factual situation of the present case," and, in any event, there is no conflict between the holdings by the Court of Appeals for the Eighth Circuit below and the Court of Appeals for the Fifth Circuit in *Texas & New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F. 2d 141 (5th Cir., 1962).

ARGUMENT.

I.

THE PROPOSED MARSHALLTOWN YARDS CONSOLIDATION IS CLEARLY WITHIN THE SCOPE OF THE TRANSACTION APPROVED BY THE COMMISSION AND WITHIN THE CONTEMPLATION OF THE PARTIES TO THE STIPULATION.

A. The Consolidation of These Two Separate, But Contiguous and Connected Railroad Yards at Marshalltown, Iowa, Together With the Elimination or Coordination of Other Duplicating Facilities, Was an Essential Consideration in the Commission's Approval of the Purchase Transaction.

North Western's proposed consolidation of its Marshalltown yards flows directly from its acquisition of the properties of the M&StL., as authorized by the Interstate Commerce Commission in its Finance Docket No. 21115. It is an integral part of the over-all unification of these two separate properties clearly to be anticipated from the Commission's approval of the entire transaction. In its order the Commission found that "each applicant provides service at the present time through separate facilities to 20 different communities * * *"; and further that "(I)ntegration of the two railroads would permit the * * * elimination of duplicate facilities through the consolidation of yards and terminals." (*Supra*, p. 3).

*In suggesting that the proposed yard consolidation was not to be anticipated from the evidence before the Commission, petitioners engage in an arithmetical tour de force intended to establish that yard consolidations proposed by North Western will have a far greater impact on employees than the consolidation of accounting departments to which considerably greater emphasis was given

The Marshalltown yards are contiguous, connected and obviously capable of being operated most efficiently as a single yard rather than as two separate and unrelated entities. As stated in the notice of proposed coordination, it is contemplated that as a single unit these yard facilities can be operated with one less engine and engine crew assignment.

As noted, the Commission's order authorizing North Western's acquisition of the M&StL properties was entered pursuant to its powers under Section 5(2) of the Interstate Commerce Act to give approval and authorization to "any carrier • • • to purchase • • • the properties • • • of another." The dominant legislative purposes underlying the enactment of Section 5(2), and of its predecessor sections of the Interstate Commerce Act, have been declared in unmistakable terms by this Court.

In *New York Central Securities Corporation* v. *U. S.*, 287 U. S. 12 (1932), in construing the term "public interest" under the similar provisions of Section 5(2) of the Transportation Act of 1920, the Court stated (at p. 25):

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by North Western in its evidence before the Commission. Pfau, p. 6).

The reference to "125 to 150" accounting department employees who would be "adversely affected" related to the elimination of that many positions from which the substantial economies specified in Hearing Exhibit No. 1 under "General Expenses" would be realized (R. 197-200). By comparison, as proposed by North Western, three yard consolidations at Marshalltown, Mason City and Minneapolis would result in the elimination of a total of five positions (R. 250, 305, 307). The references in the notices to 304 employees "directly affected" relates only to the combination of the separate seniority rosters on which these employees are included. It does not relate to savings from the elimination of such positions. Because of the relatively small savings involved in this category, the total economies from yard consolidations were not specifically computed in the evidence before the Commission. However, as already noted, specific reference was made in the evidence and in the Commission's order to the integration or the elimination of duplicating yard facilities and to minor shifts in divisional boundaries.

> "* * * the term * * * has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

Similarly, in *Texas v. U. S.*, 292 U. S. 522 (1934), the Court referred to the policy considerations underlying the Acts of 1920 and 1933 in these terms (at p. 530):

> "It is a primary aim of that policy to secure *the avoidance of waste.* That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Cases cited.] The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provisions and best use of transportation facilities'."

This Court found these public purposes to have been further extended by the Transportation Act of 1940. Thus, in *Seaboard Air Line Railroad Company v. Daniel*, 333 U. S. 118 (1948), reference was made (at pp. 124-5) to the Congressional policy, reflected in Section 5, of providing for the maintenance and development of an economical and efficient railroad system as "a matter of primary national concern." See also: *Schwabacher v. U. S.*, 334 U. S. 182 (1948), at pp. 191-195.

Section 5(11) is applicable by operation of law to all transactions approved by the Commission under the provisions of Section 5. Accordingly, its particular provisions must necessarily be construed in terms of the general legislative purposes of Section 5. In pertinent part, Section 5(11), with reference to the Commission's general authority under Section 5, declares:

> "(11) The authority conferred by this section shall be exclusive and plenary * * * and any carriers * * * participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

This Court has in fact construed these provisions to apply, not only to the formal consummation of an approved transaction, but to any specific measures necessary to effect the economies within the contemplation of the Commission's order. Thus, in *Texas* v. *U. S.*, *supra*, it was held that notwithstanding the limitations of a state law which prohibited the removal of a railroad's general offices and shops, the lessee under a Commission-approved lease, by virtue of the provisions of the predecessor section to the present Section 5(11), was empowered to carry into effect the removal of such offices and shops in order to realize the inherent economies of the lease transaction. It would, of course, have been possible for the carrier, consistent with state law, merely to execute the lease. In such case the lease may have been legally consummated, but without the ultimate realization of its potential economies. For this

Court to have so limited the effect of Section 5(11) to mere matters of form, however, would have been to emasculate the substantial aims sought by Congress in its enactment. Like the removal of offices and shops in the *Texas* case, the consolidation of the separate facilities at Marshalltown, and other common points, is among the inherent purposes of the entire purchase transaction.

B. The Proposed Coordination Was Clearly Contemplated by the Parties as Falling Within the Stipulation and the Courts Below Correctly Held That the Provisions of the Stipulation, Rather Than Those of the Railway Labor Act, Governed Its Effectuation.

If North Western and M&StL, as separate carriers, had sought to consolidate their Marshalltown yards, it is immediately apparent that such proposal would have constituted a coordination under the following provisions of Section 2(a) of the Washington Agreement (R. 206):

> "The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

Accordingly, under the provisions of Section 5 of the Washington Agreement, it would have been necessary for the two carriers to provide within their plan of coordination "for the selection of forces from the employes over all the carriers involved * * *" (R. 207). Such selection is, of course, necessitated by the merger of the previously separate seniority rosters. The objective of such selection is the treatment of the employees involved on a fair and equitable basis.

The Stipulation, which incorporates the general pro-

visions of the Washington Agreement, was entered into in anticipation of the complete "merger of the carriers" in the pending Commission proceeding. It was necessary, therefore, to modify the Washington Agreement in order to relate its provisions to the subsequent coordination of specific facilities by North Western, as the surviving carrier. Thus, Section 1D of the Stipulation was incorporated to provide (R. 202):

> "The term 'effective date of coordination' as used herein means, with respect to the various facilities or operations to be consolidated, the date on which the surviving carrier consolidates the particular facilities or operations."

What, then, is now actually in issue? First, the labor organizations belatedly assert that it was never intended that the Washington Agreement might be used as a vehicle for the merger of seniority rights. But then the question must inevitably be asked, if not this, for what? Does the "rearrangement of forces" expressly contemplated under Section 5 of the Washington Agreement suddenly exclude possible rearrangements in seniority rights? Certainly, the agreement has been consistently construed to the contrary under the special self-contained procedures established for its interpretation and enforcement.

The decision of the Committee created under Section 13 of the Washington Agreement in the *Escanaba Yard and Dock* case leaves no question regarding the contemplated modification of seniority rights under this agreement (Ex. G; R. 297-299). In that decision, following the coordination by the two carriers of their Escanaba yards and docks as the result of a Commission approved pooling agreement, the Committee held that employees of the Milwaukee Road whose Escanaba yard and dock were abandoned, were nevertheless entitled to 34% of the work on North Western's yard and dock. The award of such

work to Milwaukee Road employees was at the expense of North Western's employees, whose seniority rights otherwise entitled them to the exclusive performance of such work. The basic dispute, it should be noted, was among the employees with regard to this issue. The decision was signed by representatives of three of the labor organizations in this proceeding, the BRT representatives dissenting for reasons not disclosed.

The decision rendered by a neutral referee in Docket No. 70 involves a coordination even more analogous to the proposed consolidation of North Western's Marshalltown yards (Ex. H; R. 299-302). That decision involved the displacement of Pacific Electric employees over three miles of that company's railroad by employees of the Southern Pacific. The arrangement resulted from the agreement of the two carriers for the operation of this segment of Pacific Electric's railroad by the Southern Pacific. Once again, such an arrangement clearly involved the abrogation of seniority rights held by Pacific Electric employees over the lines of that company, and the extension of seniority rights of Southern Pacific employees. Having held this agreement between the carriers to constitute a coordination, the neutral referee then commented as follows on the relationship between that agreement and existing contract rules (R. 302):

> "As pointed out in argument, the Washington Job Protection Agreement permits changes by carriers in work assignment that are not possible under rules agreements. But there is nothing in the Agreement which indicates or hints that such changes can be introduced through unilateral action not permitted by the rules agreements.
>
> "If the element of delay seems to strengthen the hand of an obdurate party; the way is open to invoke the powers of the Section 13 Committee which has in the past directed the proper bases for implementing coordinations. E.g. See Docket No. 4."

As stated by the neutral referee, unilateral action in effecting coordinations is no more contemplated under the Washington Agreement (in this case as modified by the Stipulation) than in the change of ordinary contract rules under the Railway Labor Act. The Washington Agreement, in fact, contains explicit provisions governing the procedures to be followed in processing and reaching agreement as to the details of any proposed coordination. These are set forth in Sections 4 and 5 of the Washington Agreement, and, for the purposes of this proceeding, in Section 2 of the Stipulation. That North Western has proceeded in accordance with these requirements is not in issue. Instead, the refusal of the labor organizations to fulfill their obligations under the Stipulation is based solely on their rejection of the very substance of the Stipulation.

By what means do the labor organizations endeavor to draw away from the obvious intent and purpose of their Stipulation? Basically, it is now suggested by them that the entire Stipulation derives its status from the provisions of the Railway Labor Act, to which the provisions of Section 5(2) (f) of the Interstate Commerce Act must be subordinated. Thus, there is torn from the context of the preamble to the Stipulation the phrase "pursuant to the provisions of the Railway Labor Act, as amended" (Petn., p. 5). By their attempted characterization of the Stipulation as a collective bargaining agreement subject to the processes of the Railway Labor Act, petitioners apparently seek to avoid any judicial consideration of the function of the Stipulation as an integral part of the Commission's order. Thus, the argument is made that the Stipulation, as a collective bargaining agreement under the Railway Labor Act, may be interpreted only in accordance with the procedures of that Act (Petn., pp. 18-19).

First, it must be recognized that the preamble to the

Stipulation may include a measure of ambiguity sufficient to impart some initial coloration to the artful suggestion now made that the Stipulation is a product of, and must be governed by, the procedures of the Railway Labor Act. The preamble in its entirety states (R. 200):

> "It is hereby stipulated and agreed by the parties hereto, by and through their respective attorneys signatory hereto, that by virtue of an agreement (copy of which is attached hereto as Exhibit A) executed by the Chicago and North Western Railway Company, the Minneapolis and St. Louis Railway Company and the Joint Committee of Railway Labor Organizations representing the organizations listed in the Appendix attached thereto *pursuant to the provisions of the Railway Labor Act*, as amended, the protection of the interests of the employees of the carrier parties to the above-entitled proceeding has been provided by said agreement, and any report and order issued by the Commission in said proceeding approving the application may so state."

Whether the phrase "pursuant to the provisions of the Railway Labor Act" was indeed intended to modify "an agreement * * * executed by," as now implied by the labor organizations or "representing the organizations listed in the Appendix" may not be immediately apparent from the literal provisions of the preamble.* The remaining provisions of the Stipulation, however, decisively establish

* The fact that the modification of the latter phrase was in fact intended is indicated by the provisions of both Section 5(2) (f) itself and Section 17 (1) of the Interstate Commerce Act. The former refers to "duly authorized representatives" of employees. The latter provides that "representatives of employees of a carrier *duly designated as such* may intervene and be heard in any proceeding arising under this Act affecting such employees." Section 2 of the Railway Labor Act governs the designation of employees' representatives. In order to establish the status of the "Joint Committee of Railway Labor Organizations" as "duly designated" or "duly authorized" representatives, is was appropriate to refer to their representation as being "pursuant to the provisions of the Railway Labor Act, as amended."

that the Stipulation was not regarded by the parties as a product of the Railway Labor Act.

As previously noted, Section 5(2) (f) imposes an affirmative obligation on the Interstate Commerce Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." The fact that such protective arrangement may be the product of agreement between a carrier and its employees under the concluding sentence of Section 5(2) (f) does not relieve the Commission of its fundamental obligation to provide for appropriate protection in its order, whether through its own initiative or by its acceptance of the arrangements agreed upon. This relationship between Section 5(2) (f) and the Stipulation was initially understood by the labor organizations as well as by North Western.

Incorporating the language of Section 5(2) (f) as to the Commission's obligation "to protect the interests of the railroad employees affected," the preamble of the Stipulation concludes as follows (R. 200):

> "* * * the protection of the interests of the employees of the carrier parties to the above-entitled proceeding has been provided by said agreement, and any report and order issued by the Commission in said proceeding approving the application may so state."

In similar recognition of the duty imposed on the Commission by Section 5(2) (f) to *require* a "fair and equitable arrangement," the entire Stipulation concludes (R. 203):

> "That in the event the Interstate Commerce Commission shall grant the authority requested in Finance Docket No. 21115, the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employees as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended."

The labor organizations now seek to evade the obvious intent of the parties by citing the Commission's finding that "(A)s to the employees covered by the stipulation, no conditions in our order are necessary." It is thus suggested by the labor organizations that the Stipulation was regarded by the Commission as a private affair between the parties and beyond the purview of its concern or responsibility under Section 5(2)(f). Such interpretation ignores the immediately preceding finding that "(T)he Stipulation is of the character contemplated by section 5(2)(f) of the Act for the protection of railway employees who may be adversely affected by the transaction authorized." (R. 238.) Quite clearly, the Commission responded to the Stipulation precisely as suggested by the parties; *i.e.*, it *accepted* the agreement "as one providing a fair and equitable arrangement for the protection of the interests of such employees as provided in Section 5(2)(f) of the Interstate Commerce Act." By this acceptance, the Commission discharged its obligation under Section 5(2)(f) to require a fair and equitable arrangement. If the parties at the time of its execution had deemed the Stipulation to have the status of a contract under the Railway Labor Act beyond the Commission's jurisdiction under Section 5(2)(f), reference to its acceptance by the Commission would have been without purpose.

To establish the incredibility of the contention that the Stipulation accepted by the Commission as fulfilling its obligations under Section 5(2)(f) results from, and is governed by, the Railway Labor Act, it is only necessary to consider what effect such status would have on the operation of Section 5(2)(f) of the Interstate Commerce Act. A "fair and equitable arrangement," once having been provided for by the Interstate Commerce Commission, would immediately become subject to modification through the collective bargaining procedures of the Railway Labor

Act. Thus, the orderly "selection of forces" in a coordination under Section 5 of the Washington Agreement could be displaced by the contract demands of a labor organization with greater economic strength for the exclusive right to positions in a coordinated operation. Or, indeed, under the provisions of the Railway Labor Act the carrier itself would be empowered to process its own demands for an abrogation of the very protective conditions which were the subject of the Stipulation.

The record in this proceeding demonstrates full well the understanding of the labor organizations that contracts subject to the Railway Labor Act evolve from notices served and processed in accordance with its provisions (R. 251-295). While not explicitly disclosed by this record for the reason that the matter was not in issue at the trial, the labor organizations also know full well that the Stipulation was neither proposed nor processed under the Railway Labor Act.* It was in fact expressly designed to apply to the specific transaction then pending before the Commission and to the resulting consolidation of particular facilities by the surviving carrier. Like the entire Section 5(2) transaction of which it is an integral part, the Stipulation under Section 5(2)(f) must be construed within the framework of Section 5(11) of the Interstate Commerce Act. Its effectuation must therefore be deemed free from any "restraints, limitations, and prohibitions" of the Railway Labor Act which would otherwise bar the use of its procedures in carrying out the authorized transaction.

* While respondent does not suggest that the substance of Section 5(2)(f) could in any event be subordinated to the form of a Section 6 notice under the Railway Labor Act, it is nonetheless significant that in this case no attempt was made by any party to comply with the procedures of the Railway Labor Act in the negotiations of the Stipulation. Moreover, the Stipulation is devoid of the usual provisions included in contracts negotiated under the provisions of the Railway Labor Act with reference to the manner of amending the contract (Def. Exs. 1-20; R. 246-247).

The judgment of the courts below that (1) the Railway Labor Act is inapplicable to the proposed coordination and that (2) the provisions of the Stipulation governed the proposed coordination involves no novel issues of law. It does no more than carry out the clear intent of the parties to an agreement whose mutuality the labor organizations have belatedly sought to evade.

II.

THE JUDGMENT BELOW DOES NOT PURPORT TO REQUIRE "SPECIFIC PERFORMANCE" OF AN AGREEMENT FOR "VOLUNTARY ARBITRATION," AS INTIMATED BY PETITIONERS.

In bringing this declaratory judgment action, the North Western did not seek injunctive relief to compel specific performance of an agreement to arbitrate. It has requested no more than the declaration of the rights of the parties to an actual dispute resulting in an impasse with respect to the procedures to be followed in effecting the proposed yard consolidation. The development of this dispute is set forth in the statement of the case in this brief. (See, in particular, *supra* pp. 8-13.) The judgment below, in keeping with the limited nature of this action, consists of a simple declaration of rights in relation to the legal controversy underlying the dispute. In itself, it defines no remedies to enforce its declaration; it compels no action by petitioners.

Whether petitioners anticipate a continuing impasse by seeking to construe the arbitration procedures of the Stipulation as "voluntary" is impossible to determine at this time (Petn., p. 19). Given the purpose and provisions of the Stipulation, it would appear as an absurdity to argue that in the absence of a voluntary agreement regarding the "displacement of employees or rearrangement of

forces" under Section 5 of the Washington Agreement, incorporated as a part of the Stipulation (R. 207), the arbitration provisions of Section 2 of the Stipulation (R. 203) are equally voluntary. What is significant here, however, is the fact that this issue was neither presented nor adjudicated below.

In any event, having refused to engage in conferences or to submit to arbitration in accordance with the Stipulation, petitioners now complain that the declaratory judgment of the courts below as to the applicability of the procedures of the Stipulation to the proposed coordination may in some manner prejudice their cause before any arbitration panel which might yet have occasion to consider its substance (Petn., p. 20; R. 348-351). Such fears have no foundation other than inself-serving fancy. Nevertheless, what the expression of such fears brings to mind is the legal apocrypha of the ingenuous youth, who, on being brought to the bar of justice for having effected the demise of his parents, complains of hostility shown to an orphan. Such pleas predicated upon the consequences of one's own contrivances (whether such consequences be real or imagined) are not foreign to the law, and petitioners have ably demonstrated that their varietal forms are endless.

III.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL

There has been extraneously and gratuitously injected into this proceeding the suggestion of a conflict between the decisions of the Court of Appeals for the Eighth Circuit below and the Court of Appeals for the Fifth Circuit in *Texas & New Orleans Railroad Co.* v. *Brother-*

hood of Railroad Trainmen, 307 F. 2d 141 (5th Cir., 1962); cert. den. 371 U. S. 952 (1963). This suggestion does not come from petitioners in this proceeding who appropriately observe that "(I)t may be that the facts involved in *Texas* are so different as to prevent the assertion of direct conflict between that decision and the decision of the Eighth Circuit to which this petition is filed." (Petn., p. 17.) The suggestion of direct conflict derives instead from the "Motion for Leave to File and Petition for Rehearing of Order Denying Petition for Writ of Certiorari" filed by petitioners in the *Texas & New Orleans* case, No. 589, October Term, 1962.

These petitioners fail to apprehend the strikingly dissimilar context from which emerged the respective opinions and judgments of the Courts of Appeal for the Fifth and Eighth Circuits.

In the *Texas & New Orleans* case, prior to their submitting a section 1(18) and 5(2) application to the Interstate Commerce Commission, the carriers, by the service of Section 6 notices, *voluntarily* subjected the negotiation of a new contract involving the rearrangement of forces to the processes of the Railway Labor Act (307 F. 2d 154). In these circumstances, it was the court's conclusion that having chosen to reach an agreement under the Railway Labor Act, the carriers could not abandon those efforts through the imposition of a unilateral arrangement by means of a third party contract covering the same subject, particularly while the newly proposed rules remained in mediation (307 F. 2d 154).

Referring to these belated efforts at unilateral action, the court noted:

> "Do the processes of section 5(2)(f) and the imposition upon the union of a minimum fair and equitable arrangement chosen without its consultation by the

> carrier provide a complete and proper channel for the compromise of the forces of capital and labor? Can they be compared with the machinery of the Railway Labor Act or the Labor Management Relations Act? We do not think so. The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair and inequitable." (307 F. 2d 157.)

The profound distinctions between the *Texas & New Orleans* case and the present proceeding are immediately apparent. Far from seeking to effect any rearrangement of forces in a yard consolidation by unilateral action, North Western has submitted the effectuation of its proposed coordination to the labor organizations in accordance with the provisions of Sections 4 and 5 of the Washington Agreement, which, as modified, has been expressly incorporated in a stipulation voluntarily entered into by the labor organizations as well as the carrier (R. 201, 207). If agreement cannot be reached through negotiation, the matter may be submitted to impartial arbitration.

The Fifth Circuit was not unaware of the possibility of agreements under Section 5(2) (f) of the character entered into between the parties to this proceeding. With reference to the distinction between such bilateral agreements and unilateral carrier action, the court observed:

> "It would further appear from sections 5(2) (e) and (f) that the representatives of the carrier employees are included among the interested parties to a transaction and that a new labor contract may be one of the ingredients of a transaction. Now, are we to read into the authority of the ICC to 'approve' a transaction, the right of the carrier to unilaterally create

"one of the contracts which may be necessary to the completion of that transaction and thereupon bind a third party to it? Clearly, that does not follow as a matter of course from the normal meaning of the terms used in section 5(2) (a)." (307 F. 2d 159.)

In the distinctive circumstances of these two cases, Section 5(11) of the Interstate Commerce Act may perhaps be held to operate with a differing effect; and it may be noted that there yet remains to be presented specifically and directly to the federal courts the effect of Section 5(11) on the operation of procedures formulated and imposed by the Interstate Commerce Commission under Section 5(2) (f), as distinguished from procedures arising from an express agreement between labor and management such as is found in the present case, or changes sought to be effected unilaterally by management, as in the *Texas & New Orleans* case. While the *obiter dicta* of the Fifth and Eighth Circuits may reflect a variance of views molded in part by the differing circumstances of the cases presented for decision, in the absence of adjudication of this remaining issue, there is no conflict now presented for resolution by this court.[*]

[*] It may be noted that the Court of Appeals below expressly limited its decision to the peculiar factual situation of the present case. (App. Pet. p. 44a.) Conversely, notice should be taken of the *dictum* to the opposite in the *Texas & New Orleans* case emanating from the Fifth Circuit Court of Appeals with respect to the authority of the Interstate Commerce Commission in the formulation of such labor conditions as it finds necessary to the public interest in connection with transactions approved under Section 5(2). (307 F. 2d 161.) As noted, however, this issue is not presented for decision by the circumstances of either of these cases.

CONCLUSION.

For the reasons hereinabove stated, the petition for a writ of certiorari in this proceeding should be denied.

Respectfully submitted,

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